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No. 04-518

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

H&R BLOCK, INC., H&R BLOCK SERVICES, INC., H&R BLOCK EASTERN TAX SERVICES, INC., BLOCK FINANCIAL CORP. and HRB ROYALTY, INC.,

Petitioners,

v.

LYNNE A. CARNEGIE, on behalf of herself and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER QUESTION PRESENTED

This petition follows an earlier petitioner's effort to obtain approval of a settlement that the Seventh Circuit rejected on intimations of collusion, and that the district court then finally refused to approve. In that settlement process: (a) petitioner drafted or acquiesced in a complaint that contained the RICO class claims that it now would dismiss; (b) over many years, both before and after the Seventh Circuit rejected that settlement, petitioner repeatedly used and vigorously supported the settlement class to secure nationwide anti-suit injunctions against other prior filed class actions; and (c) reaped tens of millions of dollars by its misconduct and use of this RICO class to obtain anti-suit injunctions. Under these specific circumstances:

Did the court of appeals misapply this Court's precedents in holding defendant petitioner estopped from challenging a rule 23(b)(3) RICO class certification?

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Respondents request that the Court deny the petition for a writ of *certiorari* seeking review of an opinion of the Court of Appeals for the Seventh Circuit (reproduced at App. 1a-12a). Citations herein to the opinions below are to the pages of the copies attached as an appendix to the petition.

COUNTERSTATEMENT OF THE CASE

A brief description of the relevant facts shows that this petition presents nothing more than non-recurring, fact-specific issues that present no occasion for this Court's review. The court below, in an opinion by Judge Posner, affirmed a district court order certifying a rule 23(b)(3) class against the defendant petitioner Block entities (the various H&R Block entities generally are referred to here as "defendant") on mail and wire fraud charges under RICO, 18 U.S.C. §§ 1961-68.

The court did not hold, as co-defendant Household's supporting brief repeatedly asserts (HH Br. at 2, 5, 7-8, 9-13, 17)[1], that judicial estoppel bars a settling party from objecting to class certification, except in grounds of manageability, where the settlement has been rejected. Rather, the decision is a straightforward, completely *fact-specific* application of this Court's well-settled precedents governing judicial estoppel. Here, the court applied judicial estoppel to a peculiar instance where defendants purposefully benefitted from the settlement class both before and after it had been rejected.

Second, petitioners contend that there is a circuit split concerning the relationship of RICO and individual reliance in a class setting. There is no split where, as here, the operative complaint alleges uniform omissions. None of petitioners'

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[1] "HH" refers to the brief of the Household defendants. Household is the successor in interest to Beneficial National Bank.

citations holds that individual reliance must be shown to sustain a RICO class claim arising out of uniform omissions (*see* fn. 5 below).

Petitioner H&R Block marketed its "instant tax refund" program as part of its tax preparation services. Far from obtaining an instant refund, trusting and vulnerable taxpayers unknowingly received short-term, high interest bank loans, generally from co-defendant Beneficial National Bank: "Although the bank is the lender, the tax preparer [Block] arranges the loan . . . [and] the customer is told neither that the bank pays the tax preparer a fee for having generated the loan nor that the tax preparer receives an ownership interest in the loan" (App. 2a). These loans generate huge profits. "The annual interest rate on such a 'refund anticipation loan' (RAL) will often exceed 100%"(App. 2a). The plaintiff, for example, "paid charges of $110 on a nine-day loan of $500" (App. 13a).

Beginning in the early 1990s, numerous class actions were brought throughout the country against defendant asserting various federal and state law claims. Of special significance, the Supreme Court of Texas had affirmed certification of a state-wide class action in which defendant faced significant monetary exposure. "The total amount sought," observed Judge Posner, "could have reached $2 billion" (App. 36a). The present class action was filed in the Northern District of Illinois by prior class plaintiffs and their since defrocked counsel. Despite virtually no litigation activity by class counsel, defendants and plaintiffs proposed a nationwide settlement (App. 57a). A district judge approved that settlement in July 2000, overruling objections that the settlement was a sellout by supine class counsel interested only in securing fees. The court also certified the settlement class, which asserted the RICO class claim now under attack. Defendant participated in drafting and acquiesced in the

settlement complaint that contained the RICO allegations defendant now questions (App. 16a-17a). Then, defendant vigorously supported the propriety of the class, of the settlement, and of this RICO class claim (*see* App. throughout). Defendant also persuaded the judge to enter a nationwide anti-suit injunction, which among other things, halted the Texas proceeding on the very eve of trial (App. 36a-37a.).

The Seventh Circuit rejected the settlement and vacated the anti-suit injunction (App. 28a-47a). The court decried class counsels' "singularly feeble" representation, and it concluded, *inter alia*, that counsel were "almost certainly inadequate"(App. 38a). The court ordered that further proceedings in the district court be before a different judge.

On remand, defendant again defended the propriety of the RICO class and "vigorously argued for [the settlement's] renewed approval" (App. 50a), insisting that the settlement class could be maintained, and that the remand was intended only to cure minor evidentiary deficiencies in the record. Once again, defendant sought to restrain the Texas proceeding and others (App. 50-51a).[2] The application of estoppel principles

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[2] In addition of the injunction of *Haese v. H&R Bloc, Inc., et al*, No. 96-423 (Tx. Dist. Ct. Kleberg Cty,) in *Green v. H&R Block, Inc.*, No. 24-C-97-196023 (Md. Cir. Ct.), throughout April 2002 Block sought to stay the Maryland trial due to the revised settlement for the existent class, and to delay the start of the Maryland trial. On February 10, 2003, ten months *after* the Seventh Circuit had rejected the settlement (App. 28a *et seq.*), the *Green* court granted the relief sought by petitioners.

Also post-remand, Block likewise sought a stay of the Alabama proceeding styled *Mitchell v. H&R Block, Inc., et al.*, No. CV-95-2074 (Ala. Cir. Ct.), asserting in December 2002 that because the class "remains certified," the *Mitchell* case should remain on the administrative docket.

In *Affatato v. Beneficial Corp.*, Case No. 1:96 CV 5376. Dkt. No.

to class action settlements thus arose in the peculiar environment of a defendant urging the continued existence of the class and profiting thereby even after the settlement had been rejected on appeal. After an evidentiary hearing at which defendant proffered numerous legal and economic experts (App. 51a), the district court rejected the settlement, disqualified class counsel as inadequate, and allowed for the appointment of new class plaintiff and counsel (App. 48a-75a). No appeal was taken from these orders (App. 3a-4a).

The district court subsequently granted rule 23(b)(3) certification of the new class plaintiff's RICO claims, ones that substantively echo the settlement complaint that defendant had drafted or acquiesced in (App. 13a-27a). The court recognized (App. 23a) that, under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997), classes certified for settlement purposes must satisfy all the requirements of rule 23(b)(3), except that of manageability. The court concluded that the class action was manageable, in the process noting that defendant's counsel had "participated in drafting a previous complaint alleging violations of RICO" (App. 16a-17a).

The Seventh Circuit affirmed (App. 1a-12a). It found that, except for the issue of "manageability," defendant was estopped from challenging the propriety of rule 23(b)(3) class certification – "especially in a case in which the defendants were enthusiastic proponents of class treatment until their opportunistic change of heart" (App. 12a). Judge Posner noted

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115, defense counsel advised of the Seventh Circuit decision and asked that the *Affatato* action be held in abeyance. The *Affatato* court stayed its hand instead of ruling on a fully briefed class motion and on a partial summary judgment motion on which briefing had commenced and which had potentially serious consequences to defendants; Dkt. No. 113 (continuing stay).

that, contrary to the claim here, the estoppel resulted from far more than a simple "change of legal position":

> "[D]efendants were enthusiastic proponents of class treatment until their opportunistic change of heart." (App. 12a); *see also*, 20a-21a: "Defendants do not even argue that they obtained no benefit from the injunctions".

Judge Posner went on to reject the two other arguments advanced in this petition: (1) that because of a supposed "reliance" requirement a civil RICO suit could not be certified as a class action (*see* App. 6a-10a); and (2) a prior unreviewed interlocutory ruling by a Georgia district court denying class certification should have been given nationwide preclusive effect not because of any precedent of this Court, but because of one that defendant imputes to the Seventh Circuit (*see* App. 9a-12a).[3]

Defendant pins its reliance argument on misrepresentations. The complaint, however, does not. It rests upon omissions.[4] The Seventh Circuit easily recognized this as substantially an omissions case: "It is contended that the customer is told neither that the bank pays the tax preparer a fee for having generated the loan nor that the tax preparer receives an ownership interest in the loan" (App. 2a-3a; 30a). Defendant's revision of the operative complaint essentially means that their proffered body of authorities is without

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[3] Defendants also claim that the burden of proof respecting class certification was inappropriately shifted to them. The district court explicitly said otherwise ("It is [*plaintiff*] who bears the burden of demonstrating manageability..." [App. 24a] (emphasis in original)).

[4] The complaint has a section entitled "The Uniform Omissions" containing twenty paragraphs of them.

pertinence, as is of course any question of the relationship among RICO, reliance, and misrepresentations. But to be unequivocal, neither petitioner has identified any authority that class allegations of RICO violations concerning uniform omissions require individual reliance.[5]

In the event, the only open issue in the court of appeals was manageability of the rule 23(b)(3) class. Defendant's conduct had estopped it from challenging any other aspect of class certification, and on the facts this class action, grounded on uniform omissions, is clearly manageable. Moreover, whether the mail and wire fraud statutes were violated by a "scheme or artifice" to defraud is a question different from "whether or not the scheme succeeds and therefore causes injury" (App. 9a). But no need exists to pursue the inquiry further here. The petition presents only the question of the application of estoppel principles to unusual, if not singular, case-specific facts. Were the petition to present only the

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[5] See *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1364 (11th Cir. 2002) (decertifying class because of issues of individual reliance on numerous materially-differing misrepresentations); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666-67 (9th Cir. Aug. 10, 2004) (affirming refusal to certify class; explicitly stating that the case essentially involved affirmative misrepresentations rather than omissions); *Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *petition for cert. filed*, 73 USLW 3260 (Oct. 10, 2004) (affirming class certification in case involving misrepresentations and omissions); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) (in non-RICO context, affirming class certification against central corporate defendants and reversing class certification on claims against 23 agents who marketed and sold health plan via alleged misrepresentations); *Broussard v. Meineke*, 155 F.3d 331, 343-44 (4th Cir. 1998) (involving misrepresentations and omissions in non-RICO context, holding lower court's class certification to have been error because commonality, typicality and adequacy requirements of Rule 23(a) had not been met, because *inter alia* defendant directed "different representations to different franchisees").

question of manageability if all other requirements of rule 23(b)(3) are assumed to be satisfied, that too would be case-specific.

Expressing extreme skepticism as to the merits of defendant's preclusion argument (App. 9a-11a), Judge Posner's specific conclusion was that defendant had been estopped from making the argument because it consciously waited four years "until the settlement was finally rejected" to raise the issue. "[I]t is too late for the defendants to plead collateral estoppel when, though knowing of the *Buford*[6] decision, which was issued in 1996 and affirmed the following year, they insisted until [2003], when the district court on remand from our decision threw out the settlement, that class treatment of the RICO claim was entirely appropriate" (App. 11a).

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[6] *Buford v. H&R Block, Inc.*, 168 F.R.D. 340 (S.D. Ga. 1996), *aff'd*, 117 F.3d 1433 (11th Cir. 1997) (*per curiam*).

REASONS FOR DENYING THE WRIT

The brief statement of the case shows that the courts below decided nothing more than fact-specific, non-recurring issues invoking conventional estoppel principles. This provides no warrant for this Court's review.

Despite its highly publicized, user-friendly advertising campaigns, defendant in fact prays upon vulnerable, low-income taxpayers, omitting material information in order to impose extraordinarily high interest rates and other charges upon the unwitting clientele, individuals living in the poorest neighborhoods.[7] While defendant bases its reliance argument on misrepresentations, the complaint rests upon omissions. The Seventh Circuit: "It is contended that the customer is told neither that the bank pays the tax preparer a fee for having generated the loan nor that the tax preparer receives an ownership interest in the loan" (App. 2a-3a; also, 30a). Defendant's revision of the operative complaint essentially means that their proffered body of authorities is without pertinence, as of course is its question of the relationship among RICO, reliance, and misrepresentations. Determinative for petition purposes is that the decision below rejected defendant's contentions regarding RICO also on estoppel grounds (9a-12a).

Seeking to stave off liability from numerous lawsuits while simultaneously maintaining its huge profits from its conduct with the willing assistance of feeble, fee-driven class

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[7] These characterizations are those of the Eastern District of Virginia excoriating defendant's conduct. *JTH Tax Inc. v. H&R Block Eastern Tax Services, Inc.*, 128 F. Supp 2d 926, 933, 938 (E.D.Va 2001), *aff'd in part and remanded in part*, 28 Fed. App. 207, 211, 214 (4th Cir. 2004), and the Seventh Circuit in *Kleven v. Household Bank, F.S.B.*, 334 F.3d 638 (7th Cir.), *cert. denied*, 124 S.Ct. 924 (2003).

counsel, defendant constructed and vigorously maintained a nationwide settlement of all claims against it, including this RICO class claim. Even after remand, defendant repeatedly sought, and secured, nationwide anti-suit injunctions and stays, halting all other challenges to its conduct (App 20a-21a). "Defendants do not even argue that they obtained no benefit from the injunctions" (App. 21a). All totaled, petitioner spent four years on the insistent premises that the action, including its RICO class claim, was sustainable and class worthy. Along the way, defendant exhausted considerable time and energy of the courts and litigants. For all those years until the court threw out the settlement in 2003, petitioner "desperately wanted the RICO claim included in the class settlement . . ." (App. 11a).

Also, throughout the settlement proceedings defendant vigorously defended the propriety of the class as satisfying all prerequisites of rule 23(b)(3). See *Amchem Products*, *supra*, 521 U.S. at 620-21. Even after the court of appeals had overturned the settlement and vacated the injunctions, defendant strongly defended both the class and the class settlement. On remand, it submitted extensive briefs and affidavits to support the propriety of the class and of the class settlement. It continued strenuously to seek to halt proceedings everywhere (see fn. 2 *supra*), even having the temerity to ask the district court again to stay the Texas state court proceedings.

Applying this Court's non-controversial estoppel precedents, the Seventh Circuit held that defendant was precluded from raising any certification issue with respect to the Rule 23(b)(3) RICO class other than manageability (App. 4a-7a). And as to the only issue properly before it, the court concluded that on the particular record the class action was manageable. These narrow, fact-bound conclusions provide no basis for a call on this Court's resources.

Point I. The Court's Estoppel Holding is Simply a Fact-Specific Application of This Court's Precedent

The meaning of this Court's precedents on judicial estoppel is not drawn in controversy here. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position..." *See also* 18 Moore's Federal Practice § 134.30, pp. 134-62 (3d ed. 2000); App. 4a-5a. The petition does not ask the Court to reconsider them or to reformulate them. No circuit split is alleged to exist. Rather, the petition merely argues that the Court's principles have been misapplied on the unusual facts of this case (Pet. pp. 23-30). This argument, we note, comes from a defendant who throughout this extended litigation, even after the Seventh Circuit rejected the settlement, sought to use this class action as a vehicle by which it would secure a plenary indulgence from all meaningful liability for its deceptive conduct, and the RICO claim in particular; defendant "desperately wanted the RICO claim included in the class settlement . . ." (App. 11a). To that purpose and with acquiescence of supine class counsel (App. 30a-33a, 38a, 52a-64a, 74a-75a), defendant helped draft a complaint containing the very RICO claims asserted here (App. 16a-17a), and sought to enjoin all other proceedings (App. 5a, 20a-21a, 36a-37a, 56a). Tens of millions of dollars in profits were obtained during this period. For their part, "defendants do not even argue that they obtained no benefit from the injunctions" (App. 21a). In finding an estoppel, Judge Posner emphasized these very facts (App. 3a-5a). This holding provides no occasion for this Court's intervention: nothing more is involved than a fact-dependent, non-recurring application of settled judicial doctrine.

Defendant's apparent claim that the district court should have accorded preclusive effect to an order of a Georgia district court opinion denying class certification also was rejected on fact-specific estoppel grounds (App. 9a-11a).[8] As to the decision, defendant "prevailed in the present litigation, until the settlement was finally rejected, by arguing that *Buford* was wrong. They are estopped to argue now that it was right" (App. 11a).

So far as preclusion is concerned, there is no claim of conflict with any decision of this Court or of a circuit split, only that the decision may conflict with other decisions within the Seventh Circuit itself. Why such a conflict is of concern in this Court is never made clear. *See* Rule 10 of the Rules of this Court. In the event, the only issue on this petition is whether defendant is estopped from raising a preclusion claim because for four years, "until the settlement was finally rejected," it took the opposite position. That question, wholly fact-specific and entirely unique, is not an issue for the exercise of this Court's scarce jurisdiction.

Point II. The Manageability of This Class Action Presents No Issue of Systemic Importance

The courts below held that defendant was estopped from challenging any of the elements of the rule 23(b)(3) class action certification, except that of "manageability." *Amchem Products*, *supra*, 521 U.S. at 620-21. Although the courts addressed the manageability of the proposed RICO class, it also was clear that insofar as defendant's manageability argument

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[8] This petition in this Court is unclear as to the significance of *Buford* (Pet. 10-11, 19, 21). Defendant seems to have retreated from the preclusion argument it advanced in the court below. We nonetheless address the Seventh Circuit's rejection of the preclusion claim.

rested on RICO, defendant was estopped, in this case and its particular history, from pressing that (App. 4a-12a). Alternatively, both courts found that requirement satisfied because, so far as manageability is concerned, liability – which turned on defendant's substantially uniform omissions in failing to disclose (App. 2a-3a; 30a) – could be separated from those of individual injury (App. 6a-7a, 10a), and besides courts have not held that individual reliance need be shown in such RICO class proceedings (*see* fn. 5 above and fn. 10 below).

Yet, defendant seeks to persuade that this is an appropriate occasion to elaborate upon *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), in the class action context. The Court is asked to consider whether the "*predominance requirement*" under rule 23 prevents RICO certification because "each class member must individually prove reliance in order to establish a meritorious claim." Question Presented, par 1. Point 1 (Pet. p. 14) claims the "need to prove individual reliance when determining whether common issues *predominate* under Rule 23(b)(3)". This petition is a singularly inappropriate vehicle to address that issue. Defendant, the court below found, is estopped from challenging *any* requirement other than manageability and that estoppel includes predominance. Manageability is all Judge Posner addressed.[9] (App. 6a-9a).

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[9] Defendant suggests a conflict between this decision and others, including the Fifth Circuit's decision in *Sandwich Chef of Texas v. Reliance National Indemnity Company*, 319 F.3d 205 (5th Cir.), *cert. den.*, 124 S. Ct. 101 (2003). Other differences aside (*see* fn. 5 *supra*), *Sandwich Chef* (and other decisions cited by defendant) concerned rule 23's "predominance" requirement – a requirement defendant is estopped from contesting – not manageability, which is the only issue on this petition. *See Sandwich Chef*, 319 F. 3d at 221, *Poulous*, 379 F.3d at 665-66, *Gunnells*, 348 F.3d at 434-37, and *Klay*, 342 F.3d. 1241.

Defendant thus invites the Court to fight through and resolve the fact-specific issue of estoppel before it can properly consider any issue related to the Rule 23(b)(3) predominance requirement. It is of course telling that, throughout their arguments about unmanageability and conflicts, neither defendant nor Household makes contact with or proffers citations concerning RICO and uniform omissions, the operative contentions (*see* App. 2a-3a; 30a).[10] Manageability

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[10] For completeness, numerous decisions favor certification of Rule 23(b)(3) RICO classes especially when the claims are based on uniform non-disclosures, and reject challenges based upon various requirements of rule 23(b)(3), not just manageability. *See*, for example: *Poulous v. Caesar's World, Inc.*, 379 F.3d at 666-67 (recognizing the difference in RICO cases between affirmative misrepresentation and failure to disclose cases); *Klay v. Humana, Inc.*, 382 F. 3d 1241 (11th Cir. 1241) (11th Cir. 2004), *pet for cert filed sub nom, United Health Group, Inc., et. al. v. Klay* (Oct. 19, 2004); *In re Sumitomo Copper Litigation*, 194 F.R.D. 480 (S.D.N.Y. 2000), *app. denied, Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134 (2d Cir. 2001) (concealing conspiracy to fix prices); *In re Synthroid Marketing Litigation*, 188 F.R.D. 287 (N.D. Ill. 1999) (concealing negative information about drug); *Waters v. International Precious Metals Corp.*, 172 F.R.D. 479, 504-06 (S.D. Fla. 1996) (concealing excessive trading scheme; contains lengthy discussion of why RICO claims are appropriate on class-wide basis; allowing plaintiffs a presumption of reliance given alleged fraudulent omissions); *Peterson v. H & R Block Tax Services, Inc.*, 174 F.R.D. 78 (N.D. Ill.1997) (misrepresenting availability of rapid refund to Earned Income Tax Credit-claiming taxpayers and omitting fact that EITC-claiming taxpayers were not eligible for rapid tax return); *Spark v. MBNA Corp.*, 178 F.R.D. 431 (D. Del. 1998) (certifying RICO class of credit card holders alleging misrepresentations in marketing of credit cards; allows presumption of reliance); *Henry v. Cash Today, Inc.*, 199 F.R.D. 566 (S.D. Tex. 2000) (misrepresentations and omissions in making high-interest "payday" loans); *Rodriguez v. McKinney*, 156 F.R.D. 112 (E.D. Pa. 1994) (misrepresenting benefits of educational curriculum provided by school in order to obtain government funding for student loans); *Smith v. MCI Telecommunications Corp.*,124 F.R.D. 665, 679 (D. Kan. 1989) (MCI's commission plan for salespeople contained misrepresentations and omissions). Petitioners were defendants in *Peterson* decision, *supra*. That court certified a RICO class

alone is the possible issue left to defendant here, and in finding this requirement satisfied, the courts below broke no new ground. A class action in which the issue of liability is properly separated from that of individual injury is surely manageable. See rule 23(c)(4)(a) ("an action may be brought or maintained as a class action with respect to particular issues"). This petition concerns the application of non-controversial judicial estoppel principles to a narrow, non-recurrent body of facts. This is not a matter of systemic importance warranting this Court's intervention.

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against petitioners arising from omissions/misrepresentations in connection with a particular branch of the RAL process.

CONCLUSION

The petition for certiorari should be denied.

Dated: November 30, 2004

Respectfully submitted,

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